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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

Response Not Printed

No. [redacted] 678

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

JACKSONVILLE BROADCASTING CORPORATION,

Respondent and Cross-Petitioner.

PETITION FOR A CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 590

FLORIDA-GEORGIA TELEVISION COMPANY, INC.,

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v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

JACKSONVILLE BROADCASTING CORPORATION,

Respondent and Cross-Petitioner.

PETITION FOR A CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Florida-Georgia Television Company, Inc. (Florida-Georgia), Intervenor in the proceedings in the Court below, filed a Petition for Writ of Certiorari in this Court on September 20, 1965, seeking to reverse the decision of the Court below on grounds other than those set forth herein.

Jacksonville Broadcasting Corporation (J.B.C.) hereby petitions for a Cross Writ of Certiorari to review said decision of the Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported in Vol. 348 F.2d 75 (D.C. Cir. 1965). It is also reproduced and printed as Appendix A in said Petition filed by Florida-Georgia. The opinions of the Federal Communications Commission (F.C.C.) and of the Hearing Examiner are reported at 35 F.C.C. 401 and are printed as Appendices B and C in said Petition, and each of said three opinions is hereby incorporated herein by reference.

JURISDICTION

The judgment of the Court of Appeals became final on June 21, 1965. The jurisdiction of this Court is invoked under the authority of 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented by this Petition is:

Whether the Court of Appeals properly construed its statutory duty to review decisions of the Federal Communications Commission which involved ex parte action and influence by and on members of the Commission in behalf of an applicant for a television broadcast license:

1. When it accepted findings of fact made by the Commission as binding upon the Court in a case such as this where the hearing before the Commission grew out of the testimony before the Legislative Oversight Committee (LOC) and testimony before the Commission evidencing ex parte action on behalf of the original successful applicant. The principal issue involved prior official actions of the Commission itself challenging its very integrity and did not in any way involve or require the exercise of expertise on the part of the Commission.

2. When it erroneously failed to examine the undisputed facts of record (under the specific circumstances of this case) and thus erroneously adopted

the Commission's finding that the principals of Florida-Georgia had no knowledge of and did not condone, ratify and adopt the ex parte activities on its behalf and therefore was not disqualified to receive the award of Channel 12.

3. When it erroneously failed to examine the undisputed facts of record (under the specific circumstances of this case and thus erroneously adopted the Commission's finding that J.B.C. should be disqualified because it "attempted" to influence the Commission through third parties "to decide the case on its merits and not on political influence" even though not one of said third parties interceded with the Commission on J.B.C.'s behalf.

4. When it approved the use of an illegal double standard by the Commission in weighing the conduct of Florida-Georgia and J.B.C. in the original comparative hearing.

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, applicable to this Petition are set forth in Appendix D of Florida-Georgia's Petition and incorporated herein by reference.

STATEMENT

The facts of record upon which this Cross-Petition is based are as follows:

The original applications for a construction permit for a television station on Channel 12 in Jacksonville, Florida, were consolidated for comparative hearing by order of the Commission on January 6, 1954. These hearings opened on February 15, 1964, and after the record was closed on December 7, 1954, the Examiner issued an initial decision under date of April 4, 1955,

recommending the grant of the construction permit to J.B.C. Exceptions to this initial decision were filed on May 13, 1955. Commission counsel concurred with the Examiner in recommending that J.B.C. should be given the award. In February 1956 oral argument was held before the Commission and shortly thereafter the Commission issued instructions to its staff to prepare a draft decision granting the Channel 12 construction permit to J.B.C. The principals of Florida-Georgia[1] were aware of this action by the Commission. Between the time of the vote to prepare a decision in favor of J.B.C. and June 27, 1956, a number of ex parte representations were made to the Commission on behalf of Florida-Georgia. Nothing was placed on the record between the time of the oral argument in February 1956 and June 27, 1956, when the Commission had before it for the first time the draft decision which had been prepared in favor of J.B.C. "in accordance with its instructions." This draft was again considered at the July 5, 1956 meeting at which time the Commission ordered the preparation of a revised decision granting the application of Florida-Georgia. The Commission next considered the Jacksonville case on July 18, 1956, when the draft decision favoring Florida-Georgia was submitted. The Commission again voted to pass over both draft decisions and they were not again considered until a meeting of the Commission on August 29, 1956. At this time the Commission by 4 to 2 vote adopted the decision granting the license to Florida-Georgia and denying the applications of J.B.C. The Chairman of the Commission and one member dissented. This opinion of the Commission was not appealed from by J.B.C. because of the then serious illness of James R. Stockton, its President and principal stockholder.

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[1] One of the three applications for Channel 12 (the other applicant, the City of Jacksonville, has long since withdrawn its application so will not again be referred to herein).

As a result of hearings subsequently held by the subcommittee on Legislative Oversight, Committee on Interstate and Foreign Commerce, House of Representatives (L.O.C.), it was brought out that while the original case was pending before the Commission a number of ex parte presentations regarding the comparative hearings were made to the Commission on behalf of Florida-Georgia. The Commission, when informed of this fact, undertook additional investigations[2] relating to such alleged ex parte activities and ordered that the record of the original Channel 12 hearing be reopened and that hearings be held on four separate issues. The two issues pertinent to this Petition were:

1. To determine whether any of the members of the Commission who participated should have disqualified himself from voting in the proceedings before the Commission which resulted in the award of a construction permit for a television station on Channel 12 in Jacksonville.

2. To determine whether any party to the proceedings before the Commission which resulted in the award of the construction permit for Channel 12 in Jacksonville, directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct or improprieties in connection with the proceeding.

At the end of the hearings conducted by the Commission's Examiner[3] it was recommended to the Commission that:

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[2] Commission order of July 29, 1960 (released August 2, 1960), which reopened the original comparative hearings.

[3] Unlike other cases remanded to the Commission (e.g. *WORZ, Inc. v. F.C.C.*, 268 F.2d 889 (D.C. Cir. 1959), 106 App.D.C. 14, the Commission did not select an independent "specially appointed hearing examiner" but designated one of its regular examiners to hear the case. An additional examiner (who did not participate in the hearings) was later designated to assist in preparation of the Initial Decision.

A. Commissioner Mack should have disqualified himself from participating in the original proceedings.

B. The grant to Florida-Georgia was void *ab initio* because of Mack's illegal participation.

C. The City and J.B.C. were disqualified from consideration in any further proceedings because of "attempts by individuals, identified with them to influence the Commission through methods outside the recognized and public processes of adjudication."

D. Florida-Georgia was not disqualified from further consideration and "nothing in this record may be held to reflect adversely on its application." (I.D. p. 19, par. 7; Tr. 6202, JA 375.)

The Commission's General Counsel[4], who had conducted the entire investigation on behalf of the Commission and who was the only party involved who interviewed all the witnesses and had access to their records (since much of the testimony was put into the record by way of written statements), *filed exceptions to the recommendation that Florida-Georgia should not be disqualified and in its brief to the Commission strongly recommended that Florida-Georgia should be disqualified.* (See infra, page 18.) As to George Hodges, one of Florida-Georgia's principals, *the Commission's general counsel stated, "the lack of candor and evasiveness which characterizes his entire testimony compel the finding that Hodges' exculpatory testimony is unworthy of belief and his denials of complicity must be disregarded in toto."* (p. 26, General Counsel's Brief)[5]

J.B.C. also filed exceptions to the Examiners' recommendations.

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[4] Emphasis supplied throughout this Petition unless otherwise noted.

[5] For additional statements by F.C.C. General Counsel see infra, page 18.

After oral argument, the Commission issued its decision which substantially adopted the findings of the Examiners *and completely ignored the recommendation of its general counsel.* From this decision J.B.C. appealed to the United States Court of Appeals, District of Columbia Circuit. The Court of Appeals by a two to one vote affirmed the Commission's finding that the original award to Florida-Georgia was void *ab initio* due to the ex parte activities of Commissioner Mack. The Court reversed that part of the Commission's findings which again granted Channel 12 to Florida-Georgia. The Court held that due to the ex parte activities of other parties on behalf of Florida-Georgia, Florida-Georgia should not be given the award on the existing record. It, therefore, directed the Commission to receive new applications and to conduct a further hearing to determine who the recipient of the award of Channel 12 should ultimately be. The majority opinion accepted the findings of fact made by the Commission as to Florida-Georgia and as to J.B.C. (without any analysis of or reference to those facts) and affirmed the Commission's disqualification of J.B.C. The dissenting opinion, however, concluded that Florida-Georgia did have knowledge of the ex parte activities carried on in its behalf and (together with J.B.C.) should therefore be disqualified from further participation in any reopened hearing. The dissent also held that if Florida-Georgia was held not to be disqualified then J.B.C. should not be. The dissenting opinion sharply criticized the illegal double standard used by the Commission in judging the conduct of the applicants and the obvious lack of impartiality in appraising evidence during the proceeding.

This Cross-Petition for Certiorari is directed to the majority opinion and to that portion of the dissent holding J.B.C. disqualified.

REASONS FOR GRANTING THE WRIT

1. Under its scope of review the Court of Appeals should have examined facts of record de novo.

It is a well recognized principle of law that the Court of Appeals will not disturb the findings and conclusions of the F.C.C. (or any other administrative agency) *where the action of the F.C.C. is clearly within the application of its expertise in administering the act under which it was established.* There are valid reasons for this well established principle.[6] Even though this is true, there are still exceptions which if they exist enable the injured party to seek reversals of F.C.C. by the Court of Appeals. Furthermore, this case does not come within the above general principle. The principles enunciated in the *Pottsville* and the *Schreiber* cases are wholly inapplicable to this case. Those cases (and other like cases cited by Florida-Georgia in its Petition) deal specifically with instances involving the expertise attributed to the Commission in administering the act. The question here does not involve such ex-

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[6] As this Court recently held in *FCC v. Schreiber*, 381 U.S. 279, 14 L.Ed. 2d 383, 391:

"In the Pottsville Broadcasting case, this Court stressed, in upholding this delegation of broad procedural authority, the established principle that administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' 309 US, at 143, 84 L ed at 662. This principle, which has been upheld in a variety of applications, is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."

pertise.[7] Furthermore, the Administrative Procedure Act specifically says that the Court of Appeals "shall hold unlawful and set aside agency action, findings and conclusions found to be * * * unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." (Section 10(e); Florida-Georgia's Petition, App. B, p. 80.) *Where, as here, you have a situation in which the F.C.C. itself was and is on trial under the first issue of the case, it is urgently necessary that the court not accept the findings of fact by the Commission but should review the facts de novo to determine whether justice has been done.* Since the number one issue (supra, p. 5) involved the possible disqualification and the integrity of the Commission, its determination of the weight to be given to the evidence should be scrutinized critically rather than accepted blindly by the reviewing Court.

The dissent below recognized the general rule by saying, "I agree with the broad proposition relied on by my colleagues that our scope of review of Commission action is limited." (p. 12, Judge Burger's dissent; Florida-Georgia's Petition, App. A, pp. 32-33.) However, the dissent then emphasized the point the majority opinion overlooked by stating that "the instant situation goes to the integrity of the Commission's processes in a fundamental manner. * * * *When a regulatory agency so far departs from protecting the public interest, some means must be found to ventilate the proc-*

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[7] Here we have the all important question as to how broad is the scope of the reviewing Court's authority in cleansing decisions of the Commission which are tainted with improper ex parte actions by one of its own members as well as by persons acting in behalf of the successful applicant. This question, involving as it does the integrity of the Commission as well as the integrity of its decisions, necessarily brings into play an extraordinary broadening of the Court's scope of review.

esses employed." (fn.1, p. 12 dissent; Florida-Georgia's Petition, App. A, p. 32).[8]

The entire body of law relating to cleansing our judicial and administrative bodies of ex parte activity has been developed by the courts (*Universal Oil Products Co. v. Root Refining Co.*, supra fn.7), not by the administrative agencies. As the Ninth Circuit aptly held in a case involving the SEC's judgment on the question of fiduciary duty,

> "The able and learned district judge was, we think, as well qualified to pass upon what are the proper standards . . . as was the Commission. If any 'expertise' was involved, it belonged to the district judge . . ." *S.E.C. v. Cogan*, 201 F.2d 78, 86 (9th Cir. 1952).

The problem here is one involving an analysis of "broad equitable principles" in which the Court need not defer to any administrative solution. See *S.E.C. v. Chenery*, 318 U.S. 80, 87 L.ed. 626 (1943). If the Court is compelled to accept without question (and without a thorough review of the facts) the findings of the Commission in a case such as this, then the right of appeal is a hollow mockery bordering on a farcical waste of the time of all parties involved. The Appellant's apparent right of appeal to the Court would afford him no

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[8] *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 90 L.ed. 1447, 1452-53.
". . . tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. *It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.* Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. *The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."* *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.ed. 1250, 1256.

protection of his rights to fair play and even-handed treatment so essential to the administration of justice in a case where the facts of record upon which the Commission's conclusions are based are of paramount importance and where the expertise of that administrative body is not in any sense involved.

Such critical scrutiny in situations of this kind provides the only adequate way in which abuse of the administrative processes may be properly "ventilated." One well recognized authority has aptly stated:

> "Experience has now proved that judicial review impairs an administrative program *only when the review involves undue substitution of judicial for administrative judgment on problems within the agency's special competence." Davis Administrative Law*, Sec. 28.21, pp. 112-113 (1958).

The majority opinion was therefore in error in stating, "We accept their findings under the rule applicable to the scope of our review." (Florida-Georgia's Petition, App. A, p. 30, par. IV.)

2. An examination of facts de novo would have disclosed disqualification of Florida-Georgia.

Petitioner is well aware of the fact that neither the Court of Appeals nor this Court, will, under normal circumstances, review the facts of record involved in an administrative hearing. However, this Petition is not directed to the normal situation involving the expertise of the administrative body in administering the act.

This case requires (because the integrity of the administrative body is the basic issue) that the Court review the evidence and weigh specific facts of record in order to properly determine whether justice has been done.

For these reasons it becomes necessary to present to this Court as a basis for granting this petition, a few of those facts showing the flagrant ex parte activities of the principals of Florida-Georgia and those acting on

behalf of the principals of Florida-Georgia. Because, if the Court below had correctly considered the facts of record, it would have been forced to conclude that Florida-Georgia was disqualified.

The record before the Court of Appeals contained unchallenged and undisputed testimony showing that George Hodges, one of the principal stockholders of Florida-Georgia, as well as a director of Florida-Georgia, and the individual "charged with the responsibility of prosecuting the application for Florida-Georgia," received a written communication from Monsignor Sheehy (who had been requested to help with Florida-Georgia's application)[9] wherein, among other things, Monsignor Sheehy stated that George Hodges "had sought his help" and he advised Hodges that "I met a *member of the FCC* while traveling to Detroit last week and he indicated that this would be a happy solution as far as the Commission is concerned." (FCC Ex. 54, Tr. 7519, JA 310v.) Even Florida-Georgia's brief filed before the Court of Appeals admitted that such a letter was written:

> "On July 23, 1965, Monsignor Sheehy addressed a letter jointly to Mr. Stockton and Mr. Hodges in which he repeated in writing the suggestion that they merge their interests, and he reported his conversation with the Commission 'member.' (R. 5766)" (p. 31, Intervenor's Brief in the Court below).

In addition to this direct uncontradicted (in fact admitted) testimony, there were other definite facts testified to showing conclusively that Florida-Georgia did have knowledge of and did ratify and condone the repeated ex parte activities on its behalf!

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[9] Sheehy told three witnesses that he had been requested to help George Hodges with his Channel 12 application and that he was helping him with the Commission. Each of these witnesses so testified and their testimony was not contradicted by Sheehy or any other witnesses. (FCC Exs. 70-71, 75; Tr. 5774-75, 5786; JA 321-322, 326iv.)

Congressman Herlong testified that in a conversation with Commissioner Mack, Mack told him, "I promised Mitch Wolfson[10] a long time ago – not a long time ago – before I came up here that I was going to help him on this thing, this Channel." (Tr. 7095, JA 694.)[11]

The record showed that Congressman Herlong, a close personal friend of Commissioner Mack, was so shocked by this brazen admission that he (Congressman Herlong) reported it immediately thereafter to Chairman Harris of the LOC. Nothing can be added to the excellent treatment of this point in the dissent. (pp. 13-15 dissent; Florida-Georgia's Petition, App. A, pp. 33-35.)

The record showed that Lester Foley and C. C. Spades were actively helping Florida-Georgia with the Commission. Diary entries of Commissioner Mack showed that on two separate occasions between February and July 1956 (the critical period during which the Commission changed its vote favoring J.B.C.), Foley visited Mack to talk with him about the "Jax case." (Tr. 5891-92; JA 345.)

The record showed that Alfred Jones (a stockholder and director of Florida-Georgia) told F.C.C. General Counsel that "George Hodges had told me (Jones) that Foley and Spades were helping with the television application." (Tr. 7038-39; JA 679-680).

The record showed that Potter (Foley's construction engineer) testified that Foley had told him that "he was receiving a contract from Florida-Georgia because he had helped Florida-Georgia secure its television license." (Tr. 6899; JA 643.)

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[10] Predominant stockholder and director of Florida-Georgia.

[11] "The commission was therefore faced with solid and credible evidence from a member of Congress that he had been told by Mack of an obviously illegal advance commitment to support the Intervenor regardless of the evidence." (p. 14 dissent; Florida-Georgia's Petition, App. A, p. 34.)

The majority opinion completely ignored every word of the above quoted testimony and did not mention any of it. This was because of its erroneous conclusion that it was required to ignore it by its scope of review ("We accept their findings under the rule applicable to the scope of our review") and by its erroneous conclusion that the action of the Commission "was altogether within its responsibility *to administer the statute in the public interest.*" This case does not involve the "administration" of the Act. It involves the actions and integrity of the Commission. The Court was not limited in the scope of its review of the facts of record.

3. An examination of facts de novo would have disclosed Jacksonville Broadcasting Corporation not disqualified.

The above facts show clearly Florida-Georgia's knowledge and acceptance of ex parte activity on its behalf which should have resulted in disqualification of Florida-Georgia. On the other hand, if the Court below had correctly considered the facts of record relative to J.B.C., it would have been forced to conclude that J.B.C. was not disqualified. The sole basis upon which the Commission, and subsequently the Court below, found J.B.C. disqualified was predicated upon the completely erroneous finding of the Commission, erroneously adopted by the Court, when it said:

> "The evidence of record amply supports the findings of the Commission that this applicant through its President, who was a controlling stockholder and director, in the language of the examiners, adopted by the Commission, sought outside influence, to induce the Commission to exercise its ultimate decisional authority to adhere to the original instructions given its staff to prepare a decision upholding the grant contemplated by the Initial Decision of the Hearing Examiner, *irrespective of the significance which might be drawn by the Commission from its analysis of the evidence and the exceptions of the competing appli-*

cants and oral argument thereon." (par. I, Majority Opinion; Florida-Georgia's Petition, App. A, p. 27.)

There is not one word of testimony in the record to support this finding. The Court's failure to examine the facts of record again caused it to adopt an erroneous finding of the Commission. *The only testimony of any kind bearing on J.B.C.'s ex parte attempt was the following testimony given by Mr. Stockton, the president and principal stockholder of J.B.C.*[12]

> "As a result of information which I received from Father Sheehy I actively continued my efforts to attempt to persuade, through other (I, personally, made no direct contact with any member of the Commission) the members of the Federal Communications Commission not to decide this case against Jacksonville Broadcasting Corporation because I had supported Adlai Stevenson for President, *but to decide it solely upon the merits of the case.* * * * To this extent (and for the purpose just stated, to wit: to attempt to persuade the Commission not to decide the case against Jacksonville Broadcasting Corporation because I had supported Adlai Stevenson for President, *and to decide the case solely upon the merits*) I attempted to bring influence to bear upon the Commission * * *." (Tr. 5787, JA 329).

This testimony furnishes no possible basis for holding that J.B.C. had even "attempted" to influence the Commission "irrespective of the significance which might

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[12] Prior to any activity of any kind by Stockton, he had been told (and the undisputed facts of record show) that the Commission in the original comparative case, after analyzing the evidence and after hearing oral argument, had decided in favor of J.B.C., but that thereafter, without any additional evidence being placed on record, the Commission was changing its vote *as a result of the ex parte activities on behalf of Florida-Georgia.* The Court below found that such ex parte activities had taken place on behalf of Florida-Georgia.

be drawn by the Commission from its analysis of the evidence and the exceptions of the competing applicants and oral argument thereon."

Quite to the contrary, the Commission expressly found that no one J.B.C. so requested contacted the Commission on behalf of J.B.C.[13]

4. The Court erroneously applied same double standard applied by Commission in appraising actions of Florida-Georgia and J.B.C.

The twisted and forced connotations which the Commission placed on J.B.C.'s actions (resulting in no contacts on behalf of J.B.C.) while overlooking or excusing the repeated and rampant ex parte contacts made on behalf of Florida-Georgia constituted an erroneous application of an arbitrary double standard. This fact was most forcefully enunciated in the dissenting opinion:

> "But here the Commission has made a finding that one applicant is disqualified while another is given a 'clean bill' *in the face of evidence of ex parte contacts by the successful party at least as offensive as — and in my view worse than — those penalized by the Commission.* My conclusions on 'comparative misconduct' are not based on a reevaluation of credibility of witnesses, *for appellate judges are not free to engage in such excursions; credibility is for fact finders.* Rather my conclusions rest on undisputed evidence; * * * The testimony of Congressman Herlong as to Commissioner Mack's statements to him stands unchallenged; the Commission did not in any way cast doubt on Herlong's testimony. Mitchell Wolf-

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[13] "That the attorneys whom he retained, as well as the people to whom they introduced him, declined to intercede with the Commission does not exculpate Stockton, for it is the attempt itself and not necessarily the success or failure thereof which compels the finding of disqualification." (I.D. p. 21; Tr. 6203-4; JA 377-378.)

son's testimony can do no more than afford a basis for a finding — if he was believed — that he, Wolfson, secured no ex parte commitment from Mack. * * *

"I repeat that I would not venture to balance the misconduct of Appellant against that of Intervenor for the purpose of giving the award to Appellant rather than Intervenor, But I can find no record basis for the Commission to hold that the rather bumbling and naive efforts of Appellant to find out who was 'undermining its award' was evil beyond redemption, while Intervenor was blameless. *Under a single standard of conduct both Appellant and Intervenor — or neither — should have been disqualified.*" (pp. 15-17; Florida-Georgia's Petition, App. A, pp. 35-36.)

5. F.C.C. General Counsel, after thorough investigation and after record was completed, urged disqualification of Florida-Georgia.

The Court below and counsel for Florida-Georgia in its brief to the Court *emphasized that the Examiner had the benefit of observing the witnesses while they were testifying and, therefore, the Examiners' conclusion should be given added weight.* The Examiners did not have the benefit of observing more than 50% of the witnesses. The record shows that the only party to this entire proceeding who had the benefit of interviewing and observing all witnesses was the F.C.C. office of general counsel. (O.G.C.) O.G.C. was charged by the Commission with the responsibility of developing and conducting this case on behalf of the Commission. Much of the sworn testimony subsequently introduced before the Examiner was in writing and was secured and approved by O.G.C. The individual witnesses in those cases were excused from appearing in person before the Examiner. It is, therefore, vitally important to have the benefit of O.G.C.'s opinion as to all witnesses and as to the weight that should be given to their testimony (whether it was given in person or in writing). The following constitute a few pertinent ex-

cerpts from the brief of O.G.C. (relative to the Florida-Georgia ex parte activities) filed before the Commission:

> "All of the foregoing *compels* the conclusion, *beyond any reasonable doubt,* that the Foley and Spades visits to Mack in April, May and June, 1956, and January, 1957, *were in connection with and on behalf of the Florida-Georgia application and that George Hodges knew of and fostered these activities.*
>
> *"The record also reflects Foley's efforts on behalf of Florida-Georgia in the uncontradicted testimony of Alan Potter,* a former Beiswenger-Hoch employee, that during the middle months of 1956 Foley had told him that the firm would probably receive some business from Florida-Georgia because of Foley's friendship with Hodges and Foley's efforts in behalf of the Florida-Georgia application (Ex. 35). *And Hodges' knowledge of these activities is reflected not only by the Sheehy letter but also by the statements which Alfred Jones admittedly made to Commission staff in May, 1960, to the effect that he had been given to understand by Hodges that Foley and Spades were helping with the Florida-Georgia application* (Ex. 72)." (O.G.C.'s Brief to Commission, pp. 43-44).
>
> "It is also clear, however, that a full and proper consideration of the evidentiary record will establish not only the improper conduct of Foley, Spades, Simmons, and Chase, *but also that George Hodges is inextricably* tied in with such conduct." (O.G.C.'s Brief to Commission, p. 55).
>
> "The culpability of Florida-Georgia must, of course, follow from the complicity of Hodges in these ex parte approached on its behalf. Further, Alfred Jones, a director and stockholder of Florida-Georgia, knew of Foley and Spades' improper activities from Hodges (Ex. 75)." (O.G.C.'s Brief to Commission, p. 56).

O.G.C. strongly urged and recommended that Florida-Georgia be disqualified. Yet on the face of these strong statements and recommendations by O.G.C. (borne out by the record), the denials and the contradictory statements, of the principals and agents of

Florida-Georgia were blandly accepted by the Commission and, thereafter, were not examined or mentioned by the Court below because of its erroneous belief that it was prohibited from doing so by its "scope of review."

On the other hand, the President of J.B.C.'s honest statements have been twisted into unrecognizable form although there was a complete absence of evidence contradicting his testimony.

If the integrity of the administrative process is to be preserved, it can only be done by applying the same standard to all parties alike. The majority opinion committed a grievous error in not doing so. The dissenting opinion in the Court below accurately characterized the Commission's rejection of undisputed evidence against Florida-Georgia as "astonishing sophistry! Indeed what impertinence!" In relation to this evidence the dissenting opinion stated, "the Commission is not bound by such nice evidentiary distinctions and indeed does not ordinarily stand on them; it is permitted — in fact *required* in the public interest — to consider reliable evidence which might be admissible in court."[14] (p. 16, fn.4, dissent; Florida-Georgia's Petition, App. A, pp. 35-36.)

It is clear, therefore, that the Commission used a double standard in admitting evidence and drawing conclusions therefrom and in refusing to give appropriate similar weight to evidence regarding the conduct of J.B.C. and Florida-Georgia.

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[14] In *Citizens TV Protest Committee v. F.C.C.*, the Court below emphasized this very point:
"* * * 'However unwittingly, the Commission seems to have assumed the defense of its grant, rather than the public interest, as its primary role in the proceedings.'" 348 F.2d 56, 62. See *Clarksburg Pub. Co. v. F.C.C.*, 96 U.S. App. D.C. at 215, 225 F.2d at 515.

CONCLUSION

This case presents a fundamental question involving the division of responsibilities between the F.C.C. and the Court of Appeals for the District of Columbia Circuit. The importance of the question here presented is pointed up by the fact that, in addition to this Petition, there are now pending three other Petitions for Certiorari involving the same fundamental question.[15] Each of these four Petitioners is asking this Court to define the *extent to which*, and the *limits under which*, the Court of Appeals for the District of Columbia can and must function when reviewing the action of F.C.C.

Three of the Petitions assert that the Court of Appeals exercised broader reviewing powers than those granted to it under the Administrative Procedure Act. These Petitions in effect request that "the proper administration of the Communications Act *requires that the limits of the Court of Appeals* function to review the Commission's efforts to cleanse its own processes *be definitely established.*" This present Cross-Petition on the other hand, shows that the *Court failed to exercise the authority and responsibility given to it under the Communications Act* by failing to examine de novo the facts of record where those facts bear directly upon the integrity of the Commission itself. These four Petitions thus show that the decisions of the Court below were inconsistent in theory and application, and if allowed to stand would leave the law in an unsatisfactory state.

This Court is, therefore, asked to review these conflicting theories and to settle once and for all important

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[15] No. 204, *Mid-Florida Television Corp. v. F.C.C.*, October Term 1965; No. 500, *Halpern & Seltzer v. F.C.C.*, October Term 1965; No. 397, *United States v. American Broadcasting-Paramount Pictures, Inc.*, October Term 1965.

questions involving the construction of the Communications Act of 1934.

It is appropriate to point out that the Government (as represented by the F.C.C. and the Attorney General of the United States, as parties respondent) is not opposing the grant of the several requested writs, presumptively because it, too, desires to have this question of national importance concerning the respective roles of the federal courts and the F.C.C. (in cases involving illegal influence) settled by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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